



December 18, 2001

Ms. Sarajane Milligan  
Assistant County Attorney  
County of Harris  
1019 Congress, 15th Floor  
Houston, Texas 77002-1700

OR2001-5955

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156315.

The Harris County Right of Way Department (the "department") received a request for information relating to twenty-four roadway projects, including information on the right-of-way alignment, displaced owners, and status and timeline of each expenditure category. You state that the department has responsive information regarding the Civil Justice Center/Courthouse Complex Expansion, Jana Lane, Tanner Road, Spring Cypress Road, and Ella Boulevard. However, you indicate that the department does not have information concerning the remainder of the listed roadway projects. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ diss'd); Open Records Decision No. 452 at 3 (1986). You claim that the responsive information regarding the Civil Justice Center/Courthouse Complex Expansion, Jana Lane, Tanner Road, Spring Cypress Road, and Ella Boulevard is excepted from disclosure under sections 552.103 and 552.105 of the Government Code. We have also received arguments from the requestor. See Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted representative samples of information.<sup>1</sup>

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin by noting that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate . . . .

Therefore, the completed appraisal reports contained in the submitted information are subject to section 552.022(a)(1). In addition, the submitted project cost summaries may be subject to section 552.022(a)(5). The cost summaries consist of working papers used to estimate the need for and expenditure of public funds by the department. Thus, to the extent the total estimate for each project has been completed, the cost summary for that project is public under section 552.022(a)(5). Both the appraisal reports and any cost summaries subject to section 552.022 must be released unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law. You do not contend that the submitted information is excepted under section 552.108. Furthermore, sections 552.103 and 552.105 are discretionary exceptions and are not "other law" for the purpose of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Consequently, we find that you must release the submitted appraisal reports, which we have marked, as well as any of the submitted cost summaries relating to projects for which the total estimate has been completed.

With respect to the remainder of the submitted information, we address your argument under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

(1) the location of real or personal property for a public purpose prior to public announcement of the project; or

- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). This office has concluded that information about specific parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. Open Records Decision No. 564 at 2 (1990). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state that the submitted information relates to roadway projects that have already been publicly announced by the Harris County Commissioner's Court. You further state that while the department has successfully acquired some of the land for the five projects at issue, it has yet to acquire all of the parcels of land in each of the projects. Therefore, you contend that release of the submitted information would impair the department in negotiating deals for the remaining parcels by revealing the property designated for acquisition as well as pricing information on the property. Based on your arguments and our review of the submitted information, we agree that the cost summaries are excepted from disclosure under section 552.105 to the extent they are not otherwise subject to section 552.022(a)(5). However, because the projects have already been publicly announced, we find that the submitted maps, which relate to the location of real property affected by the project, are not excepted from disclosure under section 552.105.

You also contend that the maps are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986).

You indicate that Harris County has instigated condemnation proceedings to acquire property for three of the projects at issue. You further indicate that Harris County is still negotiating the acquisition of property in the remaining two projects, but that if negotiations fail, Harris County will file condemnation proceedings. You further contend that the maps relate to these pending and anticipated condemnation proceedings because they "show the property to be affected by the proposed roadway projects and which properties will have to be acquired by Harris County for the projects." Based on our review of your representation and the submitted information, we conclude that you have demonstrated that litigation is both reasonably anticipated and pending and that the submitted maps are related to that litigation for purposes of section 552.103. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.--Austin 1997, no pet.) (information need not be relevant to the substantive issues in litigation in order to relate to litigation for purposes of Public Information Act). Accordingly, we conclude that the authority may withhold from disclosure the submitted maps pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated and pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, you must release the submitted appraisal reports and any of the submitted project cost summaries relating to projects for which the total estimate has been completed. You may, however, withhold the remainder of the project cost summaries under section 552.105 of the Government Code. You may also withhold the submitted maps pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

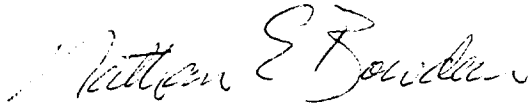
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Nathan E. Bowden".

Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 156315

Enc: Submitted documents

c: Mr. Brett B. Warren  
Barron, Adler & Anderson  
3000 Smith Street  
Houston, Texas 77006  
(w/o enclosures)